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# In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
PETITIONERS

*v.*

NORTHERN STATES POWER COMPANY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988) | 3 |
| *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940) | 7 |
| *Indiana Michigan Power Co.* v. *Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996) | 4 |
| *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959 (D.C. Cir. 1982) | 8 |
| *North Star Alaska* v. *United States*, 9 F.3d 1430 (9th Cir. 1993) | 3 |
| *North Star Alaska* v. *United States*, 14 F.3d 36 (9th Cir.), cert. denied, 512 U.S. 1220 (1994) | 8 |
| *Sharp* v. *Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986) | 3 |
| *Spectrum Leasing Corp.* v. *United States*, 764 F.2d 891 (D.C. Cir. 1985) | 8 |
| *Transohio Savings Bank* v. *Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992) | 3-4 |
| *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940) | 7 |
| *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) | 8 |
| *Yankee Atomic Electric Co.* v. *United States*, No. 98-126C (Fed. Cl. Oct. 29, 1998) | 4 |
| Statutes and regulation: | |
| Administrative Procedure Act, 5 U.S.C. 701 *et seq.* | 2 |
| 5 U.S.C. 702 | 3, 7 |
| 5 U.S.C. 702(2) | 3 |
| 5 U.S.C. 704 | 7 |
| All Writs Act, 28 U.S.C. 1651(a) | 4 |
| Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.* | 1 |
| 42 U.S.C. 10134(a) | 6 |
| 42 U.S.C. 10139 | 3, 10 |
| 42 U.S.C. 10139(c) | 3 |

Statutes and regulation—Continued: Page

42 U.S.C. 10165(b) ..... 6
42 U.S.C. 10168(d) ..... 6
42 U.S.C. 10222(a)(5) ..... 2
Tucker Act, 28 U.S.C. 1491 ..... 7
10 C.F.R. 961.11:
Art. II ..... 2
Art. IX ..... 4
Art. IX.A ..... 5, 6
Art. IX.B ..... 5

Miscellaneous:

3 Restatement (Second) of the Law : Contracts 2d (1981) ..... 8

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## REPLY BRIEF FOR THE PETITIONERS

As the petition for a writ of certiorari explains, the decision of the court of appeals has substantially disrupted the legislative design for resolving disputes concerning disposal of spent nuclear fuel under the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10101 *et seq.* Notwithstanding the court of appeals' acknowledged lack of authority to adjudicate contract claims against the United States, the court has issued a writ of mandamus directing the Department of Energy (DOE) in its implementation of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste (Standard Contract). That decision significantly undermines the jurisdiction of the Court of Federal Claims in a controversy of national significance and with potentially significant monetary impact for the parties. The court's imposition of that relief raises a substantial issue involving the interaction of the Tucker

Act, the NWPA, and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

1. Both the state and utility respondents assert that their claims arise under the NWPA itself rather than under the Standard Contract. See Util. Br. 8, 10, 18; States Br. 10, 12, 16, 20. Indeed, the state respondents suggest (Br. 16) that the "plain language" of the Act supports their claims. Neither group of respondents, however, quotes the statutory provision that DOE is alleged to have violated. That reticence is understandable. The pertinent NWPA provision does not direct DOE to accept spent nuclear fuel (SNF) by January 31, 1998; rather, it states that "[c]ontracts entered into under [the Act] shall provide" for commencement of disposal by that date. 42 U.S.C. 10222(a)(5).

Consistent with that statutory requirement, Article II of the Standard Contract provides that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998." 10 C.F.R. 961.11. Because the NWPA requires only that contracts between DOE and utilities must incorporate the January 31, 1998, deadline, and because Article II of the Standard Contract satisfies that requirement, respondents cannot demonstrate the existence of a statutory violation. Rather, any breach that DOE may have committed by failing to commence disposal of SNF is a breach of the contract only. Indeed, the court of appeals ultimately recognized that "[w]hile the statute requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance.

Breach by the DOE does not violate a statutory duty." Pet. App. 18a.[1]

Because DOE's obligation to accept SNF for disposal arises only under the contract, the judicial review provision of the NWPA (42 U.S.C. 10139) is inapplicable here. Moreover, the only potentially applicable waiver of sovereign immunity, 5 U.S.C. 702, does not apply because (1) the Tucker Act impliedly forbids any relief on a contract with the United States other than money damages, and (2) damages relief is explicitly excluded from the APA's waiver of sovereign immunity. See *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523-1524 (D.C. Cir. 1986). See also *Bowen* v. *Massachusetts*, 487 U.S. 879, 910 n.48 (1988). Contrary to respondents' argument (Util. Br. 15-17), this Court's decision in *Bowen* does not support their claim. As the courts of appeals have recognized, *Bowen* did not involve a contract with the United States and does not address the application of 5 U.S.C. 702(2) in that context. See *North Star Alaska* v. *United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (en banc); *Transohio Savings Bank* v. *Director*,

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[1] As the petition explains (at 23-24), the 180-day limitations period established by 42 U.S.C. 10139(c) would have barred respondents from asserting that the terms of the Standard Contract are inconsistent with the NWPA. The utility respondents take issue with that proposition, stating (Br. 12) that "a party aggrieved by the application of an agency rule may challenge that application even though the statutory time limit for judicial review of the promulgation of the rule has passed." Our point, however, is not that the utilities are foreclosed from challenging DOE's implementation of the Standard Contract—only that they must pursue such challenges in the forum designated by Congress for contract suits against the government. The cases cited by respondents are inapposite, since none of them involved the administration of a contract with the United States.

*Office of Thrift Supervision*, 967 F.2d 598, 613 (D.C. Cir. 1992).

2. Both the *state and utility respondents* contend (Util. Br. 8-9; States Br. 18-19) that the judgment below was authorized by the All Writs Act, 28 U.S.C. 1651(a), as a permissible means of enforcing the court of appeals' mandate in *Indiana Michigan Power Co.* v. *Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996). As our petition explains (at 18-19 & n.10), however, the court of appeals' authority to enforce its mandate does not extend to reviewing and invalidating the preliminary stages of a contract remedial process, the results of which could only be reviewed in another court. Nor does a court's power extend to determining in advance the preclusive effect of its prior judgment in actions filed in another tribunal.

Respondents' characterization of the court of appeals' ruling also ignores the highly intrusive nature of the mandamus relief awarded in this case. The court interjected itself in the dispute resolution process created by the contract, and it summarily reviewed and rejected DOE's preliminary determination that its delay in performance was "[u]navoidable" within the meaning of Article IX. The court's decision substantially interferes both with DOE's own processes of contract administration and with the orderly adjudication by the Court of Federal Claims of suits arising under the Standard Contract.[2]

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[2] In *Yankee Atomic Electric Co.* v. *United States*, No. 98-126C (Oct. 29, 1998), the Court of Federal Claims rejected the government's motion to dismiss the plaintiff's suit for failure to pursue an equitable adjustment, the remedy specified by the Standard Contract for an avoidable delay in contract performance. See Util. Resp. Supp. Br. SA-8 to SA-36. The court concluded that the equitable adjustment remedy was not exclusive with respect to

Finally, the decision in the instant case cannot properly be regarded as a means of enforcing the *Indiana Michigan* mandate because (contrary to the ruling of the court below) there is no logical contradiction between the earlier holding that DOE's obligation to accept SNF is "unconditional" and DOE's determination that its delay in fulfilling that obligation is unavoidable. As the petition explains (at 20), the "[u]navoidable delays" provision of the Standard Contract presupposes a failure of performance by one of the contracting parties. Respondents may regard the remedy set forth in that provision to be inadequate. It is, however, the remedy

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the plaintiff in that case and did not preclude a damages claim for breach of contract. *Id.* at SA-25.

The utility respondents suggest (Supp. Br. 2-3) that the Court of Federal Claims' decision in *Yankee Atomic* was based on that court's own independent analysis of the court of appeals' decision in *Indiana Michigan*. In fact, the court of appeals' mandamus order in the instant case substantially influenced the course of proceedings in the Court of Federal Claims. As the Court of Federal Claims noted, DOE has construed the mandamus order to "prohibit[] [DOE] from arguing that its failure to begin SNF disposal services is an unavoidable, non-compensable delay under Article IX.A of the Standard Contract." Util. Resp. Supp. Br. SA-18. The Court of Federal Claims accordingly limited its preclusion analysis to the question whether Article IX.B of the Standard Contract furnishes the exclusive remedy for *avoidable* delays. See Util. Resp. Supp. Br. SA-23 to SA-31. In concluding that the Article IX.B remedy was not exclusive, the court specifically contrasted the language of Article IX.B with that of Article IX.A, and strongly suggested that the latter provision *would* furnish the exclusive remedy for an unavoidable delay. *Id.* at SA-27. In short, the court of appeals' directive that DOE treat its delay in performance as avoidable has directly and substantially affected the Court of Federal Claims' resolution of the question whether utilities may seek a remedy (*i.e.*, damages) other than those provided by the Standard Contract.

the contracting parties agreed to with respect to delays in performance that result from "circumstances beyond the reasonable control of the Purchaser or DOE." 10 C.F.R. 961.11 (Art. IX.A).[3] In any event, respondents' dissatisfaction cannot justify the court of appeals' extraordinary holding that the very catalyst that can first bring the contract's remedial provisions into play—the finding of a failure of performance—automatically eliminates one of those provisions from consideration in proceedings to interpret and apply those provisions (proceedings committed to the exclusive jurisdiction of the Court of Federal Claims).

For essentially the same reasons, there is no merit to the utility respondents' contention (see Br. 12-13) that DOE's failure to seek further review of the judgment in *Indiana Michigan* bars the agency, under the doctrine of *res judicata*, from raising any jurisdictional objection

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[3] Respondents repeatedly insinuate (States Br. 9 n.6, 22; Util. Br. 5 n.1) that DOE is capable of accepting SNF for disposal but has simply refused to do so. As the petition explains (at 10 n.5, 22), however, DOE's preliminary determination that the delay in performance was unavoidable was supported by an extensive account of the legal and practical obstacles to the development of a suitable repository. Respondents emphasize (States Br. 9 n.6; Util. Br. 5) that DOE is physically capable of accepting SNF at the present time. However, with respect to the spent fuel at issue in this case—*i.e.*, SNF covered by contracts under the NWPA—DOE's authority to begin disposal services is circumscribed by the specific limitations of the Act. Under 42 U.S.C. 10165(b) and 10168(d), DOE may not proceed with an interim storage program for a specific site until after a site for a repository is recommended to the President in accordance with 42 U.S.C. 10134(a), and it may not begin construction of such a facility until the Nuclear Regulatory Commission has issued a license for a repository. See Br. in Opp. at 16 n.6, *State of Michigan, et al.* v. *United States Department of Energy, et al.*, petition for cert. pending, No. 98-225.

to the relief awarded by the court of appeals in the present case. The court in *Indiana Michigan* did not purport to resolve any question concerning the application of the Standard Contract's remedial provisions. The parties therefore had no opportunity to litigate the propriety of a judicial order setting aside DOE's preliminary determination under the Delays Clause.[4] In *Indiana Michigan*, the court reviewed and set aside DOE's published interpretation of a provision of the NWPA. During the pendency of *Indiana Michigan*, no contract claims had been presented to either DOE or the Court of Federal Claims. The court of appeals limited its relief to a remand for proceedings consistent with the opinion. There was no opportunity to litigate the jurisdiction of the court of appeals to review and pretermit contract proceedings, since the court had not suggested that such relief could be appropriate.[5]

3. Respondents argue (Util. Br. 8; States Br. 10) that the court was authorized to entertain their petitions for review because those petitions did not present contract claims or request money damages. The courts of

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[4] Indeed, the state respondents observe (Br. 17) that "[t]he 'avoidable' or 'unavoidable' issues did not really exist until the DOE itself placed it at issue in response to the court of appeals' remand."

[5] Even if *res judicata* would otherwise be applicable, that doctrine cannot bar relitigation of an underlying jurisdictional issue "where the issue is the waiver of immunity." *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940) (distinguishing *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940)). Here, the issue is whether the relief granted by the court of appeals came within the waiver of sovereign immunity found in the APA, 5 U.S.C. 702, 704, or is governed exclusively by the waiver found in the Tucker Act, 28 U.S.C. 1491. *Res judicata* presents no barrier to the consideration of that issue.

appeals have recognized, however, that the Tucker Act's preclusive effect on the jurisdiction of another court turns "both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought (*or appropriate*)." *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982) (emphasis added). Accord *North Star Alaska* v. *United States*, 14 F.3d 36, 37 (9th Cir.), cert. denied, 512 U.S. 1220 (1994); *Spectrum Leasing Corp.* v. *United States*, 764 F.2d 891, 893 (D.C. Cir. 1985). In light of the fact that the obligation to begin disposal services by January 31, 1998, is grounded in the Standard Contract, the respondents' request for an order requiring compliance with the deadline was in substance a request for specific performance, whether or not respondents framed their claims in that manner. And the request for permission to escrow fee payments was in essence a prayer for a declaration that the utilities could suspend performance of their reciprocal obligations under the contract. See 3 Restatement (Second) of the Law: Contracts 2d § 345 cmts. a-d (1981).

In any event, the relief actually awarded by the court of appeals set aside a determination by the agency administering the contract, DOE, as to the effect and application of a particular provision of the contract, the Delays Clause. Such relief goes directly to contract implementation and has long been available to government contractors through actions founded on the contract under the Tucker Act. See *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966). Had the respondents requested the relief ultimately granted by the court below, the question whether the Tucker Act precluded the court of appeals from granting such relief would necessarily have arisen. If (as we contend) the court of appeals would have lacked jurisdiction to entertain such a claim, the relief the court granted can-

not possibly become appropriate by virtue of the fact that respondents requested a somewhat different remedy. Both the court of appeals and the Court of Federal Claims are courts of limited jurisdiction, and they can exercise no power beyond that vested in them by Congress.

4. The utility respondents argue (Br. 19-21) that review of the jurisdictional issue would be premature in light of other pending litigation. But their suggestion (Br. 19) that the Court of Federal Claims may hold the Delays Clause to be entirely inapplicable to this controversy is speculative. Indeed, that court granted the plaintiff in *Yankee Atomic* (see note 2, *supra*) partial summary judgment on liability without addressing that contention. Respondents also assert (Util. Br. 19-20) that the Court of Federal Claims might choose to apply *Indiana Michigan* in the same manner as did the court of appeals in the instant case, even if that court's mandamus order was not in effect. The manifest purpose and effect of the court of appeals' mandamus order, however, is to pretermit the administrative and judicial processes by which respondents' contract claims would otherwise be resolved. As we explain above (see note 2, *supra*), the court of appeals' mandamus order has already had a significant impact on pending damages actions in the Court of Federal Claims. The possibility that the Court of Federal Claims might have reached the same conclusion even in the absence of the court of appeals' mandamus order does not alter the disruptive effect of that order. It is no more than the usual possibility that exists when one court has improperly encroached upon the jurisdiction of another.

Finally, the utility respondents rely (Br. 20-21) on the pendency of new litigation in the court of appeals brought by five of the respondents. See *Consolidated*

*Edison Company of New York, Inc.* v. *United States Department of Energy*, No. 98-1358 (D.C. Cir.). In that case, five utilities which are also parties to the instant litigation have invoked Section 119 (the judicial review provision) of the NWPA, 42 U.S.C. 10139, and asserted claims for, *inter alia*, damages for breach of contract, specific performance, unconstitutional taking, and violations of due process. Contrary to respondents' contention (Util. Br. 20), the judgment under review does address the interaction of the Tucker Act and Section 119 of the NWPA. See Pet. App. 17a-19a. Moreover, far from suggesting that the petition in the instant case is premature, the utilities' ongoing efforts to pursue further claims in the court of appeals reinforces the need for this Court to declare the proper limits of that court's jurisdiction.

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For the foregoing reasons and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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*Solicitor General*

NOVEMBER 1998